

STATE'S RESPONSE TO DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION TO REMAND

The State need not present all arguably exculpatory evidence to the Grand Jury; the State only needs to make a fair and impartial presentation of the evidence. The defendant may not question the sufficiency of the evidence presented to the Grand Jury.

The State of Arizona, by and through undersigned counsel, respectfully requests this Court to deny the defendant's Memorandum in Support of Motion to Remand, based on the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

FACTS:

The defendant is charged with leaving the scene of a fatal accident. The defendant was driving a large tractor-trailer in the left lane going northbound; the victim's vehicle was in the right lane, also going northbound. The defendant's truck moved slightly into the right lane; the lug nuts from the truck's right front wheel hit the victim's vehicle on its left corner panel. The impact caused the victim's vehicle to spin out of control in front of the defendant and into the southbound traffic where it was struck by another vehicle. The defendant then stopped his vehicle, but left before the police arrived. Two witnesses told the police the tractor-trailer was the cause of the accident and the defendant was then brought back to the scene. Paint matching the victim's vehicle was found on the lug nuts of the defendant's right front wheel.

LAW AND ARGUMENT:

The role of the Grand Jury is to determine whether probable cause exists to believe that a crime has been committed and that the person being investigated committed it. *State v. Sanchez*, 165 Ariz. 164, 171, 797 P.2d 703, 710 (App. 1990).

Expanding the Grand Jury's role beyond that point would put Grand Juries in the business of holding mini-trials. *State v. Baumann*, 125 Ariz. 404, 408-409, 610 P.2d 38, 42-43 (1980). Since the function of the Grand Jury is accusatory, not adjudicatory, the State is under no obligation to present an anticipated defense. Arizona courts will grant a motion for remand to the Grand Jury only if the prosecutor interferes with the jurors' inquiry into the evidence of the essential elements required for a particular crime to have been committed. *Nelson v. Royston*, 137 Ariz. 272, 276, 669 P.2d 1349, 1353 (App. 1983).

A. The testimony presented to the Grand Jury was not prejudicial or misleading.

The defendant alleges that Detective Douglas's testimony before the Grand Jury was prejudicial and misleading, thus depriving him of substantial procedural due process. The prosecution must present the evidence to the grand jury in a fair and impartial manner. "Due process compels the prosecutor to make a fair and impartial presentation to the grand jury." *Trebus v. Davis*, 189 Ariz. 621, 623, 944 P.2d 1235, 1237 (1997).

An examination of the Grand Jury transcript clearly shows that the State made a fair and impartial presentation of the evidence. In making a determination of probable cause, there is no "mechanical test" to decide if due process has been satisfied. What is necessary for a fair and impartial presentation will vary from case to case. Due process is violated when perjured or false testimony is material to the indictment, thus precluding a Grand Jury from being able to find the existence of probable cause. *Trebus v. Davis*, *supra*; *Nelson v. Royston*, 137 Ariz. 272, 669 P.2d 1349 (1983); *State v. Jacobson*, 22 Ariz. App. 128, 524 P.2d 962 (App. 1974); *United States v. Basurto*, 497 F.2d 781 (9th

Cir. 1974). When courts have remanded cases to the Grand Jury, they have done so upon findings that the prosecution knowingly used false or misleading testimony, and that that testimony was material to the Grand Jury's finding of probable cause.

In this case, the testimony of Detective Douglas was neither misleading nor false. He explained the facts of the accident and the statements made by the two witnesses to the Grand Jury. The detective also gave his opinion that the defendant knew that his truck had hit the victim's vehicle, based on the circumstantial evidence that the defendant stopped his truck and the type of accident it was. The Deputy County Attorney admonished the Grand Jury not to use the detective's opinion on that issue as evidence, but rather to decide whether they believed the defendant knew about the accident based on the evidence presented. The Deputy County Attorney also told the Grand Jury that the fact that the detective had an opinion should be irrelevant, and that the Grand Jurors should decide whether they thought there was sufficient evidence from which to infer that the defendant knew he struck the victim's vehicle.

The detective said the witnesses never saw the defendant get out of the tractor-trailer. The defendant claims that this was prejudicial information. The detective also told the Grand Jury that the defendant told him he saw the car spin out in front of him, then saw it in his rearview mirror go into the southbound lanes where it was struck by a southbound vehicle. The defendant then told the detective that he pulled the truck over and started to walk back to the scene; however, he decided he did not need to stay because there were already enough people there. The detective relayed this information to the Grand Jury as well.

Later in the Grand Jury proceeding, one the grand jurors specifically asked if the defendant knew he had hit the other vehicle. Twice, the detective stated that the defendant told him that he did not know he hit the other vehicle.

One of the grand jurors also asked if the defendant's occupation as a Phoenix Fire Fighter was relevant to the case, noting that they had not been told of someone else's occupation on prior cases. Once again, the Deputy County Attorney said, "if you don't think it's relevant don't consider that information."

It should be noted the Grand Jury was allowed to ask questions at the end of the prosecution's presentation of evidence, and the grand jurors did in fact ask several questions concerning this incident. There is no evidence in the entire record of any type of misleading of the Grand Jury. Therefore, the Grand Jury was not misled, nor did the State present only prejudicial evidence against the defendant.

Evidence presented to a grand jury need not be admissible in trial. *State v. Fulminante*, 193 Ariz. 485, 491, 975 P.2d 75, 81 (1999). The grand jury can make its determination based in whole or in part upon hearsay evidence. *Franzi v. Superior Court*, 139 Ariz. 556, 679 P.2d 1043 (1989); *State v. Bowling*, 151 Ariz. 230, 232, 726 P.2d 1099, 1101 (App. 1986). These broad investigatory powers as empowered by the legislation are essential to the Grand Jury's historical role in our criminal justice system.

B. The State is not obligated to present all arguably exculpatory evidence to the grand jury.

The State need not present exculpatory evidence to the Grand Jury, unless the evidence is "clearly exculpatory evidence" -- i.e., evidence of such weight that it would deter the Grand Jury from finding the existence of probable cause. *State v. Coconino County Superior Court [Mauro]*, 139 Ariz. 422, 678 P.2d 1386 (1984).

The defendant claims that the State withheld clearly exculpatory evidence from the Grand Jury. The contention that a Grand Jury must review all exculpatory evidence clearly misinterprets the Grand Jury's primary function of determining whether probable cause exists to believe that a crime has been committed and the individual being investigated was the one who committed it. *State v. Baumann*, 125 Ariz. 404, 610 P.2d 38 (1980). None of the defendant's claims of exculpatory evidence would deter the Grand Jury from determining that probable cause existed. A witness's statement that the victim's vehicle had moved over to the shoulder on the right side of the road to avoid being hit by the truck is not "clearly exculpatory evidence." Neither is the fact that the witnesses said the victims in the white vehicle were obviously deceased at the scene; that the driver of the car that hit them was not wearing a seat belt; or that the driver was almost 79 years old. Nor is it "clearly exculpatory evidence" that the southbound vehicle that hit the victim's vehicle did not leave any skid marks or show any other signs of trying to avoid the impact, or that both witnesses saw that a nurse was taking care of the other driver. The fact that the Defendant is a Phoenix Fire Fighter and did not stay to help the nurse might put the credibility of the defendant in question, because one would think that two medical people helping in this situation would be better than one. However, the grand jurors were told not to consider the defendant's occupation if they didn't think it was relevant. Finally, the defendant claims that the State withheld "clearly exculpatory evidence" that one witness said he was recently involved in an accident with a tractor-trailer and is disillusioned with truck drivers at present. First, this evidence is not exculpatory; and second, this information was not provided to the State. How can

we present information to the Grand Jury when that information is not in our possession?

What the defendant fails to realize is that the State is not obligated to present exculpatory evidence before the Grand Jury, absent a request from the Grand Jury. In this case the Grand Jury asked several questions and they were not misled. Therefore, this Court should deny the defendant's motion to remand.

C. The defendant may not inquire into the weight, sufficiency, or nature of the evidence the Grand Jury used to reach its probable cause finding.

It is a "long established rule that an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence." *State ex rel. Collins v. Kamin*, 151 Ariz. 70, 725 P.2d 1104, 1106 (1986), quoting *State ex rel. Preimsberg v. Rosenblatt*, 112 Ariz. 461, 462, 543 P.2d 773, 774 (1975). The defendant may not attack the "nature, weight or sufficiency of the evidence" presented to the Grand Jury. *State v. Jacobson*, 22 Ariz. App. 128, 524 P.2d 962 (1974). It is well recognized in Arizona that courts generally do not concern themselves with the nature, weight, and sufficiency of evidence underlying a Grand Jury indictment, as distinguished from deciding whether the State made a fair and impartial presentation of the evidence to the Grand Jury. *Crimmins v. Superior Court*, 137 Ariz. 9, 668 P.2d 882 (1983).

The defendant here has attempted to whittle away at the facts and cut and paste from the Grand Jury transcripts and case law to create a violation of his rights. He is not entitled to do that. Whatever weight the Grand Jury gave to each fact is not subject to critique. *State v. Jacobson, supra* at 129, 542 P.2d at 963.

There are no misleading material facts or perjured testimony in this case. Witnesses saw the tractor-trailer slightly merge into the right lane where the victim's vehicle was. The defendant argues that some of the evidence could be interpreted in his favor. However, at the Grand Jury stage, the defendant may not attack the facts or argue the conclusions to be drawn from the evidence. The Grand Jury is not the place to try the case. At trial, the defendant may argue the interpretation of evidence and raise any defenses; he may not do so at the Grand Jury level.

CONCLUSION:

The State contends that the State presented the evidence to the Grand Jury in a fair and impartial manner. Based on that evidence, the Grand Jury duly returned an indictment. Therefore, this Court should deny the defendant's motion to remand and allow the matter to proceed to trial.